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A Dialog Concerning the Delivery of Gifts

PETER D. JUNGER*

The contention that law is an experimental science is one that I would dispute. It is probably unethical, and I should suppose that it is unprofitable, to perform experiments upon clients. One suspects that a maintainer cannot quite be a gentleman.

But might it not be, you suggest, possible to conduct what you call, with just a touch of Alt Wien in your voice: "Gedankenexperimente".

It is in fact possible. It is not in reality satisfactory. I know. I have tried your suggestion.

My conclusion is that one cannot conduct a mental experiment about the law, unless, of course, one is willing to settle for the functional equivalent of a 'Just So Story'.¹

On the other hand, we should perhaps be willing to settle for such unscientific simplicities. A Just So Story is certainly more sensible, and perhaps as useful, as the endless discussions of the relative values of big and little toes lost on the escalators of Bloomingdale's or Macy's, which in my recollection comprise the staple matter of continuing education courses for the practitioners. You can judge.

What follows is my demonstration—the fact that one may not be able to prove a particular negative does not, of course, imply that one cannot demonstrate it—my demonstration that legal thought experiments inevitably go awry:

It is a Just So Story: How It Happens that a Gift Must Be

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1. We lawyers are not alone. Others, with more pretension to science than we would presume to, are also afflicted with the "just so" syndrome:

"The people who come from the physical sciences have an enormous amount of difficulty with evolutionary biology," asserts Ernst Mayr, professor emeritus at Harvard's Museum of Comparative Zoology. "This was Karl Popper's problem. At first he said the 'just so' stories of natural selection cannot be proven, and evolutionary biology is not really scientific. He said this again and again. But in the last 2 or 3 years he has taken it back because he finally realized that evolutionary biology is a different kind of science from the functional sciences, from the experimental sciences, but it is nevertheless science. It is not, as the British physicist Lord Rutherford contended, just postage stamp collecting."

Lewin, *Research News, Biology is Not Postage Stamp Collecting*, 216 Sci. 718 (1982). At least no one has ever accused us of collecting postage stamps.

Delivered.

My recording equipment is, in accordance with the protocols, set up, plugged in and running in the main dining room of the Serendipity Lounge. All that is needed is a subject or two. I do not expect that they will be difficult to find, although the requirement of informing them of what I am doing, as mandated by the ethics of science and its funding agencies, does suggest that they might, like the photons of a physicist, behave quite differently in the presence of an observer than they would if they were left alone.

"You see," I say to my first—should I say?—victim, Darius Green, Esquire, a middling partner in Lawless and Friendly, "the point is to determine how lawyers think."

"As long as you pay for lunch."

"There was"—this point is made deliberately to incite—"some suggestion on the part of some of my colleagues that they don't."

"Don't what?"

"Don't think."

"I think that I will have the kidneys. May Alice join us?"

"As long as I pay for her lunch, you mean?"

"Alice, my dear, do join us." Darius is without shame. "You know, I believe, the Professor?"

I suspect that the title is used to put me, rather unkindly, in my place—somewhere below the salt. Alice DuBois and I exchange greetings.

"The Professor," says Darius, "is of the opinion that we lawyers don't think and wishes, in exchange for our lunch, to record us in the process of not doing it."

"You misconstrue . . .," say I.

"He always does," says Alice, "it's sort of a Pavlovian reaction with the poor man. I will have, I think, the sole."

"But you're quite right," says Darius, building upon his misconstruction, "that we don't think. . . . Or, at least, that we shouldn't. It just gets"—a dribble of gravy descending to his tie—"in the way."

"I think . . ."

"*Ergo eras?*"

"I think," says Alice, ignoring the interruption, "quite a bit. I don't conceive of myself as some sort of legal automaton like this know-it-all here. In fact, I was thinking just now . . ."

"Beginner's luck. What you don't grasp is that we-who-know-it-all don't need to think, any more than God does. If you know something, there is no reason to think about it. My whole point is

that if we know what we are doing, then there's simply no time or place for thinking in our work. We aren't automata, we're the gods in the machine."

"Except for professors, of course." This time the gravy drips in the vicinity of the missing button on his vest.

"But the whole trouble is that I know things that don't make sense. That's what I was thinking about."

It seems, at this point, opportune to guide the experiment into more concrete areas, and so I ask Ms. DuBois to explain what puzzles her.

"Elephants actually."

"Elephants?"

"You do not, I trust," says Darius, "instruct your students in the fine art of cross examination?"

"Darius, please hush for a minute. It was my fault. I meant the collection of china elephants, quite ghastly but worth ever so much, that the late James Sinjohn did not succeed in giving to my client, his niece Lucinda Day."

"Then you were in fact, I take it, thinking of the—shall we say?—not-giving, rather than of the elephants to which you first—correct me if I am wrong—referred?"

"Darius!"

"Yes, my dear." More spots.

"What is it that doesn't make sense?" I ask. At last the experiment seems to be on track.

"Why he didn't succeed in giving them to her. He wanted to give them to her. He intended to give them to her. In fact, he said that he would give them to her. He said that he gave them to her. He said that he had given them to her. But he didn't, didn't, and hadn't, respectively, in all three cases. And that's what I don't understand."

"Why didn't he give them to her?"

"Because he didn't deliver them, of course. He said all that in the drawing room and the elephants were upstairs in the library the whole time. It's absurd. And don't, Darius, start quoting Tertullian."

"Wouldn't think of it. What I don't see is what you think is absurd about it."

"What's absurd is that there is that silly requirement that you have to deliver a gift before it is valid. What I was thinking about was why that's so; and I can't think of a legitimate reason why."

"You make my point. There's nothing to think about. You

know it's not a gift without delivery. The Professor and his friends taught you that when you were—as you nearly still are, my dear—a mere infant in arms. And that's the end of it. If you start thinking you just get caught, like what's-his-name says, in the fly bottle."

"What is a fly bottle?"

"I don't know."

"But why isn't it a valid gift without delivery?" I ask. "There must be a reason for the rule."

The experiment seems to be going quite well.

"There isn't any rule that it isn't a valid gift. That's just the mixed-up sort of thing that professors come up with when they start thinking about the law and other things that don't bear thinking about."

"Well then," says Alice, "if it isn't a rule it must be a principle."

The experiment seems to be going very well indeed.

"Bosh!" This time the spots land on the tablecloth. "It isn't an invalid gift, it isn't any sort of gift at all. And there's no rule, reason, or—God help us!—principle behind it. It's just analytically, necessarily true. And that's the end of it. Nothing to think about."

The experiment has jumped the track.

"Look," I say, "I am not buying you lunch to hear you garble out some unscientific and irrelevant philosophical stuff about analyticity and necessity."

"It is the tragedy of the modern university that no one is more likely to be an anti-intellectual than a professor."

"Darius, stick to the point. He did buy you lunch after all, and he doesn't have your advantages—it's his job to take ideas seriously."

"Exactly. And it's not ours."

"But I still want to know why Lucinda didn't get the elephants."

"Because, my dear, her uncle Sinjohn didn't give them to her."

"But why didn't he?"

"I don't have the slightest idea. Some combination of ignorance and reluctance, I suppose." Darius throws up his hands in mock despair and his fork, a much abused instrument, seizes the occasion to escape from his manipulations. "Do be a dear and give me that fork you're not using. Mine seems to have gotten itself on the floor."

"Here."

"Thank you."

"But why is it that Sinjohn didn't succeed in giving them to her? What's the policy behind it? That's what I don't understand."

"There isn't any policy. If you would stop thinking, you would just see it."

"See what?"

"That the only reason that he didn't succeed in giving them to her, is that he didn't give them to her."

"I'm afraid," I am forced to admit, "that I don't understand."

"Well, look at it this way. Alice gave me a fork a moment ago, right?"

"Right."

"Yes," says Alice, "I did."

"But she wouldn't have given it to me if she hadn't given it to me, would she? I mean . . . that's logic."

"But not very good cross examination," says Alice.

"A palpable touch, my dear. The fact remains, however, that if Sinjohn had given the elephants to Lucinda, then there wouldn't have been any problem. Right?"

"Oh. I see. You mean that if he didn't actually deliver them to her, then he actually didn't give them to her."

"That's it, dear girl. There's neither a policy nor a thought in a carload."

"But that's just semantics."

"What else is there, Professor? Except, of course, syntax."

"But all you're saying is something like: The usage of the word 'gift' implies a delivery."

"Something like," he says; and then proceeds to expand upon the point, "You can't very well make a gift of something to someone unless you give it to him, and if you give it to him, then he's got it, and if he's got it, then you must have delivered it to him—unless, of course, he had it to begin with. More something like that."²

2. The courts have usually been quite sensible in their application of the requirement that a gift to be valid must be delivered in those situations where the would-be donee was already in possession of the subject of the donation. The leading case on this issue is probably *Cain v. Moon*, [1896] 2 Q.B. 283, which contains the following much quoted passage:

Suppose a man lent a book to a friend, who expressed himself pleased with the book, whereupon the lender, finding that he had a second copy, told his friend that he need not return the copy he had lent him: it would be very strange if in such a case there were no complete gift, the book being in the possession of the intended donee.

Id. at 289 (Wills, J.). A typical American case is *Caylor v. Caylor's Estate*, 22 Ind. App. 666,

"But that doesn't seem very satisfactory," I protest.

"How can you say that in these days when, as I understand it, the latest legal academic fad is *American Legal Nominalism*?"³

"But that's economics, not philosophy."

"Oh." And he stabs at his last kidney as if he hopes that it might contain a pearl. "This lack of, as you say, satisfaction, is the result, however, not of the simple facts, but of the mistake that you make in thinking about them."

Fortunately, Alice comes to my rescue. "I don't see what's wrong with thinking. And I'm the one who isn't satisfied. And Lucinda isn't satisfied. And I'm the one who's got to explain it to her. And I can't."

"You can't say that that is an academic problem."

"No," says Darius. "But that doesn't mean that it can be solved." He looks, for the first time, a bit insecure and orders a trifle for dessert. He's stalling. "I suppose that what I'm saying is that it's just a fact, like the table here. How do you explain the table?"

"I don't. But then I don't want to."

"She has a point, Darius. If you take the medicinal view of philosophy, it is clear that you are a failure. Alice is still afflicted with a very real problem. You can't get the fly out of that fly bottle with your ordinary language philosophizing."

"Don't gloat." A daub of yellowish blancmange, flecked with white and pink, centers itself under the knot of his tie. "You are assuming, quite improperly, that this so-called 'rule', that for a gift to be effective it must be delivered, has some sort of purpose."

"Of course it does." Alice stabs savagely at a piece of the pineapple, soaked in kirsch, that had somehow appeared before her. Research is expensive these days. "I know that you can make fun of a belief in teleological forces working in nature, but law isn't natural."

"Of course not. It is its very perversity that attracts me." Darius is looking smug again. I begin to regret, not for the first time, that I hadn't dedicated my studies to a more practical subject, like

52 N.E. 465 (1899). For some reason that is not apparent to me, these two cases, and most of the others that discuss the validity of antecedent deliveries, involve gifts causa mortis. This is not significant for our purposes. The delivery requirement is—at least in verbal terms, and I am not prepared to indulge in an analysis of the particular facts of all the particular cases—the same in the case of gifts inter vivos as it is in that of gifts causa mortis.

3. I take it that Mr. Green's reference is to a brilliant comment by Arthur Allen Leff in 60 VA. L. REV. 451 (1974) entitled: *Economic Analysis of Law: Some Realism About Nominalism*. You really should read it if you enjoy legal *jeux d'esprit*.

philosophy.

"Darius, dear man, someone—some human being—must have adopted the rule, which by the way is a real rule . . . There's nothing so-called about it." Alice is speaking very precisely, carefully enunciating each syllable. The effect is that of icicles dipped in acid. "Some human being must have adopted the rule, the rule that there can't be a valid gift without a delivery, for the first time. *And I want to know why he did it.*"

"My dear, I am not trying to tease you. Or, at least, that is not all that I am trying to do. I am also being perfectly serious. But I'm afraid—and you are not, I fear, going to like this—that the only reason why that, ah, human being, as you call him, invented the rule was . . . laziness." Alice reaches for the bread basket as he speaks. "Please. Don't throw the bread at me." He may actually be in some danger. "I mean it. In his justification I might add that he undoubtedly did not notice that he was establishing a rule. He just wanted to go play golf or whatever they played whenever it was. Which was, when? The twelfth century?"

"Lord knows."⁴

4. It is impossible to assign any particular date to the first declaration of this rule that "delivery is essential to the validity of a parol gift of a chattel. This rule appears to be as old as the common law." Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341 (1926). The antiquity of the rule is perhaps best suggested by Maitland's discussion of *The Seisin of Chattels*, 1 L. Q. REV. 324 (1885). The history of the rule from at least the time of Bracton (d. 1268) is given in *Cochrane v. Moore*, 25 Q.B.D. 57 (C.A. 1890), in which the following passage appears:

In Bracton's day, seisin was a most important element of the law of property in general; and, however strange it may sound to jurists of our day and country, the lawyers of that day applied the term as freely to a pig's ham . . . as to a manor or a field. At that time the distinction between real and personal property had not yet grown up: the distinction then recognised was between things corporeal, and things incorporeal: no action could then be maintained on a contract for the sale of goods, even for valuable consideration, unless under seal: the distinction so familiar to us now between contracts and gifts had not fully developed itself. The law recognised seisin as the common incident of all property in corporeal things, and tradition or the delivery of that seisin from one man to another as essential to the transfer of the property in that thing, whether it were land or a horse, and whether by way of sale or of gift, and whether by word of mouth or by deed under seal. This necessity for delivery of seisin has disappeared from a large part of the transactions known to our law; but it has survived in the case of feoffments. Has it also survived in the case of gifts?

Id. at 65-66 (Fry and Bowen, LL.J.). You should not be surprised to learn that the lesson of *Cochrane* is that the requirement did survive in the case of gifts. That survival is the inspiration and justification for this article. The leading modern case, besides *Cochrane*, recognizing the viability of this ancient requirement is *Irons v. Smallpiece*, 2 Barn & A. 551, 106 Eng. Rep. 467 (K.B. 1819).

"But why did he do it? What is there about that rule that is attractive to judicial laziness?"

"My problem, dear girl, is explaining something that strikes me as self-evident. If you'd just put yourself in his shoes"

"Whose shoes?"

"That old judge out there riding circuit being shot at by Angles and Saxons and thanes like they were red Indians and somebody like your Lucinda Whoopsie"

". . . Lucinda Day"

"Lucinda Day comes and files a writ of trover or replevin or whatever against her uncle's next of kin"

For once I have something to contribute: "If it was the first time, it was probably detinue. And anyway the rule probably goes back to the practices of the Germanic tribes and is mentioned in Tacitus or someplace like that, and there weren't any writs because nobody could read—to say nothing of write. And you know perfectly well that throwing Tacitus or Bracton at Lucinda's head, though it might shut her up, if fatal, is not really an acceptable solution to Alice's problem."

"My dear boy, I believe I'm actually teaching you how to construct a lucid argument. That was really quite good; though perhaps I think so because I agree with you so completely. History is, in the main, as Mr. Ford once said, 'bunk.' But that doesn't keep it from being quite useful if you invent it as you need it and take it in small doses."

Apparently my face reflects some of my indignation because Alice, who was looking toward me, bursts out laughing. "How can you justify inventing history?" she asks.

"On precedent."

There is a long pause. I think I can see what's coming well enough not to ask for an explanation. Darius slurps his coffee like a cat slurping canary soup.

It is Alice who finally asks, "What precedent?"

"Primarily that of the great Lord Coke, who probably invented more legal history than ever actually existed. What was it that Max Radin said about him?"⁵

5. I suspect that Mr. Green was referring to the following passage—it sounds like the sort of thing he would enjoy:

The mass of discourse contained in these [law] cases includes history, speculative philosophy, science, economics, sociological theories and data, as well as generalizations assumed to be derived from previous actual or imagined legal statements. It is impossible to deny that any part of this material—since it is

"I don't recall."

"Anyway, you can be pretty sure that whenever Coke gives a historical reason for anything, he made it up out of the whole cloth. Right, Professor?"

"Well . . . in a sense, I suppose, but you must realize that at the time that Coke wrote, the standards of scientific history, which were not really laid down until the Germans in the eighteenth and nineteenth centuries"

"I will forego the Germans and rest upon the great tradition of the Common Law. If Lord Coke can invent practically the entire history of our law, I can see no reason why I cannot invent the little bits and pieces that I happen to need in my own, more humble, fashion."

"But that's dishonest."

"My dear Alice, I assure you that I do my best to make sure that my inventions bear the mark of truth. They wouldn't be useful otherwise. On the other hand, I can see no reason why 'what-really-happened' should bear any resemblance to the truth whatsoever."

"What on earth do you mean by truth?"

"A Pilate come to judgment! What I mean, my dear Portia-Pontius, is that it all coheres. I can't conceive of any other coherent epistemology. Your historical reality, on the other hand, is just a lot of buzzing, booming confusion.

"If you will forgive the digression, I can give you examples easily enough. The Supreme Court has found—or do I mean, has held?—that a summary entry and detainer action against a tenant was one that at common law required a jury,⁶ and it has also held that an eminent domain proceeding is a common law action in which historically there was no right to a jury.⁷ Both statements are, I think, highly questionable from the point of view of historical reality, and they don't even seem to add up to a coherent posi-

put together on the assumption that it has some relevance to the final judgment—is legal. The fact that much of the material is erroneous, or not really relevant in spite of our assumption that it is, is not conclusive. Not only are Coke's historical mistakes the common law of modern England, as we have often been told, but any judge's mistakes on any topic are to some extent law.

M. RADIN, *LAW AS LOGIC AND EXPERIENCE* 43-44 (1940).

6. *Pernell v. Southall Realty*, 416 U.S. 363 (1974). Even if the conclusion is arguably wrong, the history of actions to recover real property that is given in *Pernell* is well worth reading in its own right.

7. I suppose Mr. Green means *Bauman v. Ross*, 167 U.S. 548, 593 (1897), but this case does not really say how the Court came to its result.

tion. But they are true, so long as the justices don't change their collective mind."

"But if you will examine the policy issues"

"I won't if I can help it," he says in his most irritating fashion and, while Alice sputters into her coffee, continues: "I thought you wanted to know how Lucinda Golightly . . ."

". . . Lucinda Day"

". . . And others like her came to lose for the first time. As I recall, she'd just filed her detinue action alleging—and here you see the beauty of treating history as a *Gedankenexperiment*"

"Now wait just a moment!" It is my turn to protest. "This is getting totally out of hand."

"Not at all, although it might if we didn't have you to fill in the blanks in the writ. What would Lucinda's writ have alleged, Professor?"

"I'm not quite sure. It would be in Latin you know. But it would be in the form of an order from the King to the Sheriff and would say something like: 'Command the named defendant that justly and without delay he render to Lucinda Day one hundred china elephants, which he owes her and unjustly detains, as she says. And if he does not do so, then let him show cause before our Justices why he had not done it.' That's roughly the idea, anyway."

"Fine. And of course the defendant, the next-of-kin What is his name, by the way?"

"Gerald Grimm."

"Grimm does not render, as you say, the elephants unto Lucinda, and in consequence he has to appear in court, poor man."

"Poor man, nothing! He's worth millions and is a miser too, to boot."

"Don't identify with your client, or you will never be able to understand anything. How, by the way, does a Gerald Grimm come to be the next-of-kin of a James Sinjohn?"

"They're half-brothers, but they never really liked each other, and Gerald went to Australia when he was young, and"

"I'm sorry that I asked. Unless, of course, Grimm murdered Sinjohn That would solve your problem."

"Not really. He has an alibi, and anyway, there are eighteen other nieces and nephews."

"Ah. Well, to get back to your problem, you can see what's going to happen when they get to court"

"Unfortunately," I feel compelled to point out, "they wouldn't

have just popped into court like that. Day would have had to file some sort of pleading, and Grimm would have had to answer, and so on. The whole point of the common law pleading system was to get the parties to agree on one simple issue that could be answered 'yes' or 'no'."

"Better yet," says Darius, who is looking with some interest at the wine card. "So what does Lucinda plead?"

"I suppose that her complaint . . . Is that what it's called?"

"Actually, it would be called a declaration."

"So handy to have a professor around."

"Darius, mind your manners. The declaration just alleges the same things that were said in the writ, and now it's your move."

"Excellent. I think the Carlos V . . ."

"No brandy for you until you tell us what Grimm is going to answer in your little *Gedankenexperiment*." Alice can really be quite forceful. Sometimes I think that Darius is afraid of her, and that that is why he blusters so much.

"All right. Gerald just alleges that he inherited . . . Oops! Sorry, Professor. He alleges that the elephants were in the rightful possession of the late James Sinjohn at the time of said James's death and that he, the said Gerald, is the said late James Sinjohn's next of kin and personal representative and that he is therefore entitled to retain the elephants aforesaid and that the plaintiff Lucinda Day has no claim, right, title or interest in or to said elephants aforesaid whatsoever."

"I trust that you don't draft your own pleadings?"

"Not in the middle ages, I don't, *mon cher Herr Doktor Professor*. Miss!"

As Darius mumbles at the waitress, Alice recites: "Now comes Lucinda and replies that the said James Sinjohn gave them to her and that the defendant Gerald Grimm wrongly detains them and refuses to give them to her."

Darius gives the response: "And I demur." And then he has the gall to order three glasses of Carlos V and add: "Though I'm not sure that the professor here deserves it."

I don't even like Spanish brandy.

"You can't do that!" Alice says.

"Sorry. *J'adoube*. Gerald Grimm demures. I sort of got carried away there."

"How can you demur? Or, rather, how can Gerald demur?"

"You don't expect him to rejoin to such a clearly defective reply, do you?"

"What's wrong with my . . . What's wrong with Lucinda's reply?"

"You haven't alleged any tort. And detinue sounds in tort, right Professor?"

"I guess so. But a wrongful detainer is alleged, and that is a tort—unfortunately, perhaps, but it quite clearly is a tort. So I think. . . ." In my mind's eye I adjust the drape of my judicial robe and the tilt of my even more judicial wig: "So I think that I will have to overrule the demurrer."

"A Daniel come to judgment."

"All right, Portia, so now we come to trial, and you're going to have to prove that the gift was made, which, of course, as you know quite as well as I do, it never was."

"I don't see why Lucinda should have to prove that the gift was made. Since this is a case of first impression, I wouldn't expect the court to have any rule about the burden of proof. The court is going to have to hear argument on that point."

"But you miss the whole point," says Darius, turning, between his gloating laugh and his libations, a sort of triumphal purple, "that is where the laziness comes in."

"I'll say I miss your point. Why should Grimm get Lucinda's Uncle James's elephants rather than Lucinda? That's the point I thought we were talking about."

"Not quite," says Darius, calming down. "We are not talking about why the common law courts would say that Gerald Grimm has a good claim to James Sinjohn's elephants; we are discussing why they would say that Lucinda Day doesn't have a good claim to them."

"As a matter of fact," I say, swallowing some brandy and feeling rather left out of the discussion, "rights to a decedent's personal property were determined by ecclesiastical courts, not by common law courts. But you aren't arguing that Grimm isn't Sinjohn's personal representative, are you?" That last question is directed to Alice.

"No."

"Then," says Darius, with a note of triumph in his voice, "it's exactly the same as if you were suing James Sinjohn for the elephants. Do you think that you would have any luck suing him in detinue because he didn't give you the elephants?"

"Stop begging the question."

"To state the question is to beg it, as Mr. Justice McReynolds didn't quite have the wit to say."

"He was before my time."

"Stop avoiding the issue. Do you think that Lucinda's suit would have prevailed against her uncle himself?"

"He's dead. Methinks the court's writ runs not so far."

"Hypothetically, I mean. If he were still alive back in the dark ages when the law was as young and green as you are now?"

"Well . . . That case does feel different. But where do you get the idea that Lucinda would have to be able to recover from her Uncle James if she is going to recover from Grimm?"

"Because Grimm is just there as her uncle's representative. That's what 'personal representative' means."

"More language analysis!"

"If you want to call it that, dear girl. Although it seems rather fundamental to me. We lawyers who don't have pretty blue eyes don't have much else to work with besides words."

"I think that your eyes have a lovely shade of green. They just match your complexion."

"Thank you," says Darius with a touch of smugness. "I'll tell you what I'll do, just to make your untenable position more comfortable. Since I don't suppose, actually, that Grimm's being Sinjohn's personal representative is necessary to my argument, I'm perfectly willing to assume that Grimm stole the elephants. I am certain that judicial laziness would still keep Lucinda from recovering."

"That's preposterous. Why should the law protect a thief?"

"That isn't the way it works. It's just that the judges are too lazy to bother to listen to Lucinda's claim. She doesn't have, to use the modern jargon, 'standing to sue'."

"But that is an administrative law concept, and we are talking about private property.⁸ I'm not talking about the Sierra Club's right to sue the Federal Power Commission. I'm talking about Lucinda's right to get the elephants from a thief. Why doesn't she have that right?"

"Because her uncle never gave her the elephants."

"Don't you two think that you're going around in circles?"

8. The issue of standing in actions to review the decisions of administrative bodies is not unrelated to the property rights of the plaintiff. See J. VINING, *LEGAL IDENTITY* (1978); Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 *YALE L.J.* 425 (1974). The archetypical "standing case" is the Mineral King case, *Sierra Club v. Morton*, 405 U.S. 727 (1972) (*holding*: Sierra Club does not have standing to object to the granting by federal agencies to Walt Disney Enterprises, Inc. of licenses to ravage the High Sierras without alleging that members of the Sierra Club make use of the region to be Mickey-Mousified).

"All I'm saying, Professor, is that Lucinda isn't going to get away with asserting a *jus tertii*."

"Oh."

"Darius, the poor old Professor has to pretend to understand Latin, but you are not going to catch me that way. 'Use' what?"

"A '*jus tertii*,'" I say hastily, "is just Latin for 'a right of a third person'. I do know that much Latin, Alice. It's part of our jargon."

"Exactly," says Darius. "Lucinda's Uncle James, or his personal representative, may have some sort of right—some right of action—against the thief, but that doesn't mean that Lucinda has one. When she comes in complaining about the thief wrongfully detaining her uncle's elephants, the court in its judicial—and, I insist, judicious—laziness, is going to ask: 'And what is that to you, my dear? And what is that to us?' Those strike me as very good questions."

"But why *should* a court let a thief keep the elephants?"

"Because courts—our sort of courts, at least—common law courts—only intervene when someone has a legitimate complaint against the defendant. In other words, they are lazy. Lucinda's Uncle James Sinjohn may have such a complaint, the public prosecutor may have such a complaint, but Lucinda does not have such a complaint. Right, Professor?"

"That is a fairly neat, if very old fashioned, explanation of the standing requirement in private actions at common law, provided always, of course, that Lucinda does not have such a complaint. I am not sure, however, that it answers Alice's question."

"You're damn tootin' it doesn't answer it; it begs it! My question was: 'Why *should* (with emphasis!) a court let a thief keep the elephants?"

"Because he has them, and because no one with a better claim to their possession is complaining to the court about that fact. In a way it begs the question to call the thief a 'thief.' Perhaps Uncle James abandoned the elephants or decided to give them to the 'thief.'"

"Hah! Now I've got you. How could he give them to the thief without delivering them?"

"Easily enough—the thief already had them. But I will withdraw that comment rather than confuse the issue. The whole point is that the law protects possessors and others with a better right to possession than the possessors, but it doesn't protect people like your client, Miss Day, who never was a member of either of those

classes."⁹

"But why does the law protect possessors?"

"Ah! There you have me, Alice, my dear. A truly lazy judge wouldn't bother to listen to anyone's complaint, not even a possessor's. I suppose that the answer is that if there is no case that a judge will judge, then it just is not proper to call him a judge. You'll say that that's just semantics, of course. And I will admit that we have reached the weakest point of my argument. Perhaps the Professor can tell us why the early law courts protected possession."

"I had not really intended to take part in this discussion, but, since you ask, one might hypothesize that the King's judges felt that they should protect possession because the King their boss had more possessions than anyone else. I should think that you would like that argument, Darius." He nods his agreement as I continue. "I suspect, however, that their main motive was to protect the King's peace. The earliest causes of action that didn't involve the distribution of governmental power"

"What are you talking about?" asks Alice.

"I mean that the earliest causes of action that did not involve freehold estates in land, and those estates were about all that there was in the way of government Those earliest causes of action all seem to have originated as non-physical responses to physical violence."

"I think that I would agree with you, Professor, if I could understand what you are talking about."

"Thank you, Darius."

"Then I suppose that I wouldn't agree," says Alice.

"As I understand it, the Professor is saying that—if you leave aside real property cases which had, in feudal times, important political implications—the only wrongs that the courts would correct were those that threatened the King's peace with some sort of disturbance, *vi et armis, contra pacem regis*, and all that."

"You state it a little more bluntly than I would dare, but I think that that is roughly correct."

9. In most common law jurisdictions a person possessing a chattel without any right to do so has an action against another who interferes with that wrongful possession. See, e.g., *Anderson v. Gouldberg*, 51 Minn. 294, 53 N.W. 636 (1892) (replevin); *Jeffries v. Great Western Ry. Co.*, 119 Eng. Rep. 680, 5 El. & Bl. 802 (K.B. 1856) (trover); *Cook v. Howard*, 13 Johns. 276 (N.Y. Sup. Ct. 1816) (trespass, *de bonis asportatis*); *New England Box Co. v. C&R Constr. Co.*, 313 Mass. 696, 49 N.E.2d 121 (1943) (action for negligent destruction of chattels). In general, see Annot., 150 A.L.R. 163 (1944).

"I don't disagree with that," says Alice. "But I don't see what it has to do with the question that Darius keeps wandering away from, which is: Why is there a delivery requirement for a gift? I can see why the courts would discourage violence, but that doesn't explain why they will refuse to admit that the gift to Lucinda was valid."

"Well, perhaps it would be easier if we turned the question around. Would you advise Lucinda to use self-help and go and take the elephants from Mr. Grimm?"

"Of course not!"

"All right But why wouldn't you give such advice?"

"Because it would be a tort, maybe even a crime. Because it would be exactly the sort of thing that you just said the medieval courts would act against. It would be a trespass *vi et armis* to personal property. That's basic."

". . . *de bonis asportatis*," I say, but am ignored.

"Exactly," says Darius, swallowing the last of his brandy and waving distractedly at the waitress. "Exactly. And if Lucinda did not follow your advice and did help herself to the elephants, then Gerald Grimm could sue her successfully. Does that explain things?"

"No."

"In that case I'd better order us another round," says Darius, matching the act to the thought. "The reason Lucinda would be liable if she just took the elephants is, of course, that her Uncle James never gave them to her. Can't you hear how silly her defense would sound:

"'And why, may I ask, did you take the elephants from Mr. Sinjohn?'

"'Well Uncle James said that he was going to give them to me.'

"'And did he give them to you?'

"'Well No. But he intended to.'

"'But did he give them to you?'

"'Well Not actually, me Lord.'

"'Then that's not a defense, is it?'" says the judge, putting on his hanging cap and ordering the bailiff to drag your poor client off to the gallows.

"You see how it would go. But if James Sinjohn had actually given, handed, made a manual transmission of, delivered, transferred possession of—use whatever word you like—the elephants to Lucinda Day, then she wouldn't even have needed a defense."

"Why not?"

"Because then she would have had the elephants herself and therefore she would not, and could not, have taken them from Gerald Grimm. And if he had taken them from her, then she would have had a good cause of action against him. That's how gifts work."

We all take a drink, Darius waving his glass in triumph, sloshing brandy on the tablecloth. "That's how gifts work. They just transfer possession peaceably. And the courts protect peaceably obtained possession. So, if you are given something, then the courts will protect you; and if you aren't, they won't. There's no policy there; no rule there. There's nothing to think about. It's just a fact. If you are given something, then you've got it; and if you've got it, then the courts will let you keep it; and if you haven't got it, because you weren't given it, then the courts won't help you get it. Simple. Them that doesn't have, doesn't get."

"Darius. You are getting overexcited."

I really do believe that Darius is afraid of Alice. At least he keeps quiet for a moment while she says:

"But, of course, I know all that; but it still doesn't answer my question as to the underlying policy that protects possession, but doesn't protect James's intent to make a gift. Perhaps in the middle ages with all the violence around, it was a sensible rule, but I don't see why we should still be stuck with it today."

"There is still a lot of violence around."

"Professor, you are getting as bad as Darius."

"No, he isn't," says the latter, recovering his self-possession. "If he was as bad as I am, he would start talking about the difference between Hohfeldian rights and Hohfeldian privileges. Except that maybe he wouldn't because he's a professor and actually knows about those things. Or, at least, is supposed to."

"I'm sorry, Alice, but I am afraid he's right in a way." I feel that I have to speak softly; I don't want her wrath turned against me; and yet the point, which Darius did not quite make, is, when you see it, a revelation. "A touch of Hohfeldian analysis would seem to be just the thing to explain why you and Darius are in disagreement, to explain that you are talking about different things."

"Oh Lord! And I thought that I was joking. I suppose that you are going to claim that I have been talking about privileges all this time, while Alice has been talking about rights. And you had the nerve five minutes ago to accuse me of indulging in semantics—as

if there were something wrong with that.”

“That wasn’t quite what I was going to say. But, considering that I am paying for this rather unprofitable lunch, I would consider it to be appropriate for you to listen to me for a moment.”

“My dear boy, speak. Do. I had thought, forgetting naively all that I know about professors, that you had wanted to listen to us. I should have known better.”

Ignoring Darius, I continue: “Everybody knows about the distinction that Hohfeld drew between what he chose to call on the one hand—perhaps unfortunately—‘rights’ and on the other, ‘privileges’; but”¹⁰

“I’m not sure that I remember that distinction; I’m not even sure that I ever heard of it,” Alice says.

“She went to one of those schools that stress policy arguments,” says Darius.

I suppose that I am too easily distracted; but, despite the amused look on Darius’s face, I feel obliged to explain—which I fear means to lecture—for a moment. “In Hohfeldian terminology, a privilege is the right, or, as I suppose I had better say, the entitlement, to use something. Thus, for example, James Sinjohn had the privilege of using his china elephants How does one use a china elephant?”

“Don’t ask,” says Darius.

“By selling them for lots of money,” says Alice.

“Hold that example for a moment, please, Alice. It’s directly relevant to the distinction that I wish to make in a moment. But,”

10. The schema distinguishing between “rights” and “privileges” first appeared in Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913) and Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *YALE L.J.* 710 (1917). These two articles were republished, with corrections, in W. HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923). Henceforth citations to Hohfeld will be to the treatise [hereinafter cited as HCHFELD].

The distinctions made by Hohfeld have left their mark—some might call it a scar—upon the *RESTATEMENT OF PROPERTY* where they are the subject of §§ 1-4. They have inspired a literature of their own. See, e.g., Corbin, *Legal Analysis and Terminology*, 29 *YALE L.J.* 163 (1919); Radin, *A Restatement of Hohfeld*, 51 *HARV. L. REV.* 1141 (1938). More modern writers still find the basic distinctions helpful. See, e.g., Kennedy and Michelman, *Are Property and Contract Efficient?*, 8 *HOFSTRA L. REV.* 711, 751-62 (1980); Junger, *A Recipe for Bad Water: Welfare Economics and Nuisance Law Mixed Well*, 27 *CASE W. RES. L. REV.* 3, 223-29 (1976). These recent writers use the Hohfeldian schema in analyses of economic efficiency. They stress the distinction between Hohfeldian rights and Hohfeldian privileges and ignore Hohfeld’s treatment of powers. In Hohfeld’s schema, a person has a right against someone else if that other person has a duty toward him; a person has a privilege against another person if he owes no duty to him. Powers, which are the portion of Hohfeld’s concepts that are relevant to this dialogue, are defined in the next footnote.

I continue, "the privilege of using the elephants by—ah, say—looking at them or throwing them against the wall is radically different from the right of excluding others from looking at them or throwing them. A right is a right . . . that is, a right is an entitlement to keep other people from doing things, which is, when you think about it, quite different from the privilege of doing something yourself. And a key difference between rights and privileges . . ." I fear that I am wandering even farther from the point, and yet the lecturer's compulsion grips me. "The key difference between rights and privileges lies in the fact that one can exercise a privilege simply by using the *res*—that is, the thing, like the elephants—to which it appertains, whereas in the case of a right, one can enforce it (at least in the normal course) only by obtaining the assistance of a court. The whole distinction is summed up in the applicable verbs: one exercises a privilege, but one enforces a right."

"How long, O Lord?" Darius says.

"Be patient. You can see, Alice, that a Hohfeldian analysis is helpful in discussing the sort of questions you and Darius were debating. Thus, Darius's position is that originally the courts recognized possession as giving the possessor both the privilege to use and the right to exclude others from using the elephants."

"I know that that is Darius's position. And I also know that it has nothing to do with my concerns."

"Exactly!" I say in triumph. "And that is because you have totally overlooked the Hohfeldian distinction between rights and privileges, on the one hand, and powers and . . . uhh, and . . . and . . . immunities; I guess that is the proper term. Anyway, you are ignoring the distinction between rights or privileges and the higher order concept of powers."

"Pardon me?"

"That's where your example of selling the elephants comes in," I say. Alice looks unhappy; Darius, bored. The compulsion is upon me.

"Hohfeld distinguishes between 'rights' and 'privileges' as opposed to what he denominates the 'power' to change the legal relations of another person or—though perhaps he would not approve of my choice of words—to transfer those rights and privileges to another person.¹¹ Now you both seem to agree that the possessor of

11. Perhaps the most accepted definition of "power" in the Hohfeldian sense is that of the RESTATEMENT OF PROPERTY § 3: "A power, as the word is used in this Restatement, is an

the elephants has both the privilege to use them and the right to keep others, at least those others without a greater right of possession, from using them. So what you have really been talking about—at least what Alice has really been talking about—is the power to transfer the elephants and why that power was not exercised successfully in her client's favor. Of course, when she spoke of selling the elephants for lots of—as I believe she said—money, she was also talking about the exercise of a power to transfer the elephants."

"Of course," says Darius, "but that does not get us any farther along. All I've been saying, to use your pseudo-scientific vocabulary, is that the rights and privileges are attached to the elephants, so the only way that one can exercise the power to transfer those rights and privileges is to transfer the elephants, and that act of transfer is, of course, exactly what we mean by delivery."

"Of course," says Alice, "the whole point is that I can't see why the transfer of the elephants is the only way to exercise the power to transfer the rights and privileges appurtenant to the elephants. The fancy vocabulary doesn't seem to help very much."

"But," I say, "transferring the elephants is not the only way to transfer the rights and privileges that go along with the elephants;

ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act." § 4 defines the related term, "immunity": "An immunity, as the word is used in this Restatement, is a freedom on the part of one person against having a given legal relation altered by a given act or omission to act on the part of another person." Hohfeld, whose prose is lumpy, puts it this way:

A change in a given legal relation may result (1) from some superadded fact or group of facts not under the volitional control of a human being (or human beings); or (2) from some superadded fact or group of facts which are under the volitional control of one or more human beings. As regards the second class of cases, the person (or persons) whose volitional control is paramount may be said to have the (legal) power to effect the particular change of legal relations that is involved in the problem.

HOHFELD, *supra* note 10, at 50-51. Some of the examples that he gives are quite instructive for our purposes.

Many examples of legal powers may readily be given. Thus, X, the owner of ordinary personal property "in a tangible object" has the power to extinguish his own legal interest (rights, powers, immunities, etc.) through that totality of operative facts known as abandonment; and—simultaneously and correlatively—to create in other persons privileges and powers relating to the abandoned object,—e.g., the power to acquire title to the latter by appropriating it. *Similarly*, X has the power to transfer his interest to Y,—that is, to extinguish his own interest and concomitantly create in Y a new and corresponding interest.

Id. at 51 (footnotes omitted). Although Hohfeld speaks of X transferring "his interest to Y," this is a form of shorthand that I cannot believe he would sanction others in using. If "title" is transferred from X to Y, then both X and Y enter into a new set of legal relations, although Y's new relations are analogous to X's old ones.

if it were, I would admit that we have no need for the 'power' terminology. You know there are other ways to transfer elephants; as you, yourself, pointed out: you can sell them."

"Excuse me, Professor. I was speaking of the law as it originally developed. At that time the rights and the privileges, and the power to transfer the rights and the privileges, all went right along with the elephants."

"Perhaps. I am not sure that the courts were ever as unsophisticated as you are making them out to be, Darius. But, in any case, Alice is talking about today, whatever you may be talking about, and today it is possible to exercise the power of transferring the rights and privileges to a thing in many different ways besides simply giving the thing to someone. And with those possibilities, the word 'power' becomes quite helpful."

"How?" asks Alice. "I don't see how the word power helps in answering my question."

"It doesn't answer your question," I admit, "but it does help ask it."

"How?"

"Isn't your question simply: Why is not a mere declaration by a possessor of an intention to transfer the thing possessed a sufficient exercise of that possessor's power to transfer the rights and powers appurtenant to the thing?"

"I suppose that that is my question, but you do not seem to have made it any simpler."

"Don't complain, dear girl. That way of phrasing things does make things more difficult for me. I can't very well claim that it is analytically true that James Sinjohn did not transfer the rights and privileges relating to the elephants because he failed to transfer the elephants. It is still analytically true that he did not make a gift of the elephants to Lucinda Day because he didn't give them to her. But that does not, I admit, answer your question as to why the courts will not treat the rights and privileges as being transferred even though the elephants remain unmoved. All that I insist is that, if the courts should decide that the rights and privileges were transferred even though there was no delivery, one should not call that process of transfer a gift."

"Then what is it?" asks Alice.

"I don't know. . . . A sale? A declaration of trust? An enforceable promise?"

"Well, then why wasn't the transfer to Lucinda a sale?" Whatever else Alice may be, she is persistent.

"Aside from the analytical conclusion to be drawn from the fact that there was, in fact, no transfer, I suppose that the answer is because there was no consideration. Right, Professor?"

"That there was no *quid pro quo*. . . ."¹²

"Then why wasn't there a declaration of trust?"

"That's a tricky one. I confess that the only answer that I have for that is that, if saying that one intends to give something to someone is enough to constitute a valid declaration of trust, then every failed gift would turn out to be valid as a trust. And if that were to happen, then all the law about gifts, including the fact that they must be delivered, would be thrown out the window. And then where would we be after having wasted a good bit of our lives and earthly goods, and perhaps even bits and pieces of our immortal souls, learning about the law of gifts from boring people like the Professor here?"¹³

12. Originally, as Lord Justice Fry makes clear in *Cochrane v. Moore*, 25 Q.B.D. 57 (C.A. 1890); see *supra* note 4, title did not pass in the case of the sale of a chattel without delivery:

It was in the reigns of the early Tudors that the action on the case on *indebitatus assumpsit* obtained a firm foothold in our law; and the effect of it seems to have been to give a greatly increased importance to merely consensual contracts. It was probably a natural result of this that, in time, the question whether and when property passed by the contract came to depend, in cases in which there was a valuable consideration, upon the mind and consent of the parties, and that it was thus gradually established that in the case of bargain and sale of personal chattels, the property passed according to that mind and intention, and a new exception was thus made to the necessity of delivery. . . .

This doctrine that property may pass by contract before delivery appears to be comparatively modern. It may, as has been suggested, owe its origin to a doctrine of the civil law that the property was at the risk of the purchaser before it passed from the vendor; but at any rate the point was thought open to argument as late as Elizabeth's reign.

25 Q.B.D. at 70-71. This point is amplified in A.W.B. SIMPSON, *A HISTORY OF THE COMMON LAW OF CONTRACT* 161-69 (1975).

13. It is well settled that, as is stated in *Estate of Smith*, 144 Pa. 428, 434-35, 22 A. 916, 916 (1891) (citations omitted):

The owner of personal property, in order to make a voluntary disposition of it, may, by a proper transfer of the title, make a gift of it direct to the donee, or he may impress upon it a trust for the benefit of the donee. It is well settled, however, that whether a gift or a trust is intended, if the transaction still remains imperfect and executory, equity will not aid in its enforcement. The expression of a mere intention to create a trust, therefore, without more, is insufficient; like a promise to give, it will not be enforced in equity. Almost all trusts are in a certain sense executory. Ordinarily, a trust cannot be executed except by conveyance; there is, in most cases, something to be done. But this is not the sense in which a trust is said to be executory. An executory trust, properly so called, is one in which the limitations are imperfectly declared, and the donor's intention is expressed in such general terms that something not fully declared is required to be done, in order to complete and perfect the trust, and to give it

"But I don't suppose that you consider that to be a satisfactory answer."

"No. I don't. And besides, Lucinda's Uncle James didn't just say that he intended to give them to her. He actually said that he had given them to her."

"Then perhaps you gave up too easily."

"You mean that . . . ?"

"Perhaps. Perhaps in an equity court that could be treated as a declaration of trust. You have a fighting chance."

And then Alice gives Darius a big kiss and runs from the room, and he sits there with a silly grin, still drinking brandy and dappled with spots, and all that the project has given me is a headache.

And that, O! my friends, is how it came to be that a gift must be delivered.

And the frustrating thing is that I have learned nothing that I did not already know. All of Darius's *Quatsch* is no more than what Lord Esher meant back in 1890 when he wrote in *Cochrane v. Moore* that "actual delivery in the case of a 'gift' is more than evi-

effect. When the limitations of a trust are fully and perfectly declared, the trust is regarded as an executed trust.

Nor, in such case, if it appear that the intention of the donor was to adopt either one of these methods of disposition, will a court resort to the other for the purpose of carrying it into effect. What is clearly intended as a voluntary assignment or a gift, but is imperfect as such, cannot be treated as a declaration of trust. If this were not so, an expression of present gift would in all cases amount to a declaration of trust, and any imperfect gift might be made effectual simply by converting it into a trust. There is no principle of equity which will perfect an imperfect gift, and a court of equity will not impute a trust where a trust is not in contemplation.

Yet, despite this declaration of principle, no case goes further than *Smith* in upholding a failed gift as a valid trust.

The last—and probably best—word on this point is that of R.A. BROWN, *THE LAW OF PERSONAL PROPERTY* 150 (W. Raushenbush 3d ed. 1975) (footnote omitted):

It must be admitted that the doctrine of the voluntary declaration of trust presents something of an anomaly in the law. Not only is it extremely difficult to apply in practice, the line between imperfect gifts and executory trusts on one hand, and perfected declarations on the other, being an exceedingly shadowy one, but all the safeguards against frauds, perjuries, and hasty and ill-considered gifts which the requirement of delivery is supposed to afford in the ordinary case, are entirely lacking in the oral voluntary declaration of trust. The doctrine is apt to degenerate into little more than a means of sustaining imperfect gifts in especially hard cases. On the other hand, it may well be that the trust doctrine is simply a step in the inevitable course of the law whereby the requirement of delivery based on the early concepts of seisin is giving away before the more modern liberal tendency which tends to disregard formalities and to determine all transactions according to the clearly expressed intent of the parties.

dence of the existence of the proposition of law which constitutes a gift, . . . it is a part of the proposition itself."¹⁴

But when I say this to Darius, he begins to fade, flickering a bit around the edges, and says feebly, as if—as is the fact—he had eaten too much, "It's more than garbage in, garbage out, you know. We have given you something—a way of looking at things—which, though incorporeal and not subject to manual transmission, should be of some value to you. But then"—growing fainter still—"I always knew that you were rather an ingrate." And—before I can kick him—he is gone, leaving behind only some spots and stains upon the air above the chair in which he still sits in memory: kidney, blancmange, and brandy.

Just so.

14. 25 Q.B.D. at 75. Lord Esher makes Mr. Green's basic point in the following passage:

Upon long consideration, I have come to the conclusion that actual delivery in the case of a "gift" is more than evidence of the existence of the proposition of law which constitutes a gift, and I have come to the conclusion that it is a part of the proposition itself. It is one of the facts which constitute the proposition that a gift has been made. It is not a piece of evidence to prove the existence of the proposition; it is a necessary part of the proposition, and, as such, is one of the facts to be proved by evidence. The proposition is not—that the one party has agreed or promised to give, and that the other has agreed or promised to accept. In that case, it is not doubted but that the ownership is not changed until a subsequent actual delivery. The proposition before the Court on a question of gift or not is—that the one gave and the other accepted. The transaction described in the proposition is a transaction begun and completed at once. It is a transaction consisting of two contemporaneous acts, which at once complete the transaction, so that there is nothing more to be done by either party. The act done by the one is that he gives; the act done by the other is that he accepts. These contemporaneous acts being done, neither party has anything more to do. The one cannot give, according to the ordinary meaning of the word, without giving; the other cannot accept then and there such a giving without then and there receiving the thing given

Id. at 75-76.